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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 913.

MID-STATE HORTICULTURAL CO., INC., *Petitioner*,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

On Petition by Mid-State Horticultural Co., Inc. for Writ of Certiorari to the Supreme Court of California.

BRIEF ON BEHALF OF RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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JOHN SPALDING FLANNERY,
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JOHN E. LARSON,
For Respondent.

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So decided in District Court of Appeal, California, herein below, Marks J., see Rec. 171.

And Affirmed by Supreme Court of California, Shenk J., without dissent Rec. pp. 196-204.

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v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

OPPOSITION TO PETITION FOR CERTIORARI TO SUPREME COURT OF THE STATE OF CALIFORNIA.

Respondent, The Pennsylvania Railroad Company, opposes the petition for certiorari and respectfully submits to this Court that the transcript of the record filed in support of the petition discloses no ground whatsoever under Rule 38 or any other rule of this Honorable Court for issuance of the writ. Looking through the legal verbiage to fundamental facts, this case is revealed as a direct attempt by petitioner to avoid the payment of freight charges, for interstate shipments already made, in violation of Section 6, Par. 7, of the Interstate Commerce Act (U. S. Code Anne., Title 49, Sec. 6, Par. 7).

All of the carloads of grapes in question were shipped by petitioner from California to New Jersey under written bills of lading signed by petitioner, which named petitioner as both consignor and consignee and which specified the exact bases for the computation of the freight charges. Petitioner, the owner of the grapes, ordered the cars diverted to its agent, Jerome Distributing Company, and Respondent delivered the cars in accordance with Petitioner's orders (R. 1, f. 2 & 3; R. 51, f. 72).

Petitioner's said agent gave respondent bank checks to cover the freight charges. These checks were dishonored by the bank and the freight charges have never been paid (R. 100, f. 153, to R. 104, f. 160).

The written bills of lading provided that the owner or consignee should pay the freight (R. 38B). Petitioner, as owner and actual consignee, was thus liable for the freight charges. It knew that its agent's checks had been dishonored and the freight charges unpaid as early as June, 1933, but it has consistently refused to pay them since.

The three-year period of limitations prescribed in Section 16, Par. (3)(a), of the Interstate Commerce Act expired on October 28th, 1935. Prior thereto, respondent had attempted to collect the freight charges from petitioner and had threatened and intended to institute suit against it for that purpose. Petitioner requested Respondent to delay suit to give Petitioner further opportunity to investigate the claim.

On October 25th, 1935, Petitioner executed and delivered to Respondent the agreement marked Exhibit "C" and set forth at large Record pp. 39-41 in which petitioner waived the defense of any general or special statute of limitations. This agreement was not signed by Respondent carrier but recited that respondent was willing, in the hope that Petitioner might conclude to pay the claim without litigation, to defer the institution of suit until January 1st,

1936, or until such earlier date as the petitioner might definitely refuse to pay the claim (R. 40, f. 53-c).

After the three-year period fixed in the Interstate Commerce Act had expired, petitioner refused to pay any of the agreed freight charges—not because it had concluded that it was not legally responsible for them, but because it had decided to violate its agreement not to plead the statute of limitations. Respondent instituted this action, about two months after the statutory period had run on the earliest car delivered and slightly over one month after the statutory period had run on the last car delivered.

The action is a simple contract action, brought by Respondent, as carrier, to collect from Petitioner, as owner and consignee, the freight agreed in the written bills of lading, which were pleaded by attaching copies thereof to the complaint.

Petitioner, by its answer, admitted performance of all contracts and of every fact essential to establish its obligation to pay the freight charges claimed (R. 51, f. 72, to R. 52, f. 73). It did attempt also to plead estoppel on part of Respondent to collect the freight charges, but that defense was properly and promptly stricken from its said answer, Petitioner conceding it not to be available in an action to collect freight charges.

Louisville & Nashville R. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59.

In violation of its agreement and for the sole purpose of avoiding its liability for freight charges, petitioner pleaded, as its sole real defense, the provisions of Section 16, Par. (3)(a), of the Interstate Commerce Act, as amended in 1920, taking the position that its agreement waiving that statute was void. The validity of that agreement under the facts of this case is the sole question which petitioner can properly present to this Court on this petition.

The Supreme Court of California, in its opinion herein (R. 196 to 204), held this action to be one ex contractu,

that Section 16, Par. (3)(a), of the Interstate Commerce Act, as sought to be here applied constituted a statute of limitations, and that petitioner's waiver of the provisions of that statute was valid. In so deciding, the California Supreme Court followed generally recognized principles of applicable law and decisions of this Court.

It is the almost universally recognized rule in America that a statute of limitations may be waived in an action on contract. That this general principle applies to Section 16, Par. (3)(a), of the Interstate Commerce Act in contract actions by carriers for the recovery of their freight charges was directly determined in *Pennsylvania R. R. Co. v. Susquehanna Collieries*, 23 Fed. (2d) 499 which is the only reported case in which a Federal court considered facts identical with those in the instant case and determined the effect of a written waiver by a shipper of said section of the Interstate Commerce Act.

There can be no doubt as to the soundness and general acceptance of the principle of law stated and applied in the *Susquehanna* case and reaffirmed and applied in the opinion of the Supreme Court of California in the instant case.

Indeed, this argument in opposition to Petitioner's prayer for the granting of Writ of Certiorari in the instant cause might well be rested upon the opinions of the District Court of Appeals, California, set forth in full at pages R. 171-179, per Marks J. and approved unanimously (judgment affirmed R. 204) by the Supreme Court of California at pages R. 196-204, without more of either statement or argument.

Petitioner seeks to avoid the application of those rulings by claiming that the Supreme Court of California should have followed the ruling of this Court in *Phillips v. Grand Trunk Ry. Co.*, 236 U. S. 662. But it is apparent from an examination of this Court's opinion in that case that the facts there involved were different from those in the in-

stant case and called for the application of different principles of law. In the Phillips case the action was brought by a shipper for the recovery of excessive freight charges and was based directly upon an order of the Interstate Commerce Commission entered after procedure provided for in the Interstate Commerce Act. The cause of action pleaded by the plaintiff in the Phillips case was one created originally by the Interstate Commerce Act and was purely statutory in origin and nature. The plaintiff had failed to file his complaint within the period fixed in Section 16 of the Interstate Commerce Act, which then applied only to actions created by the Interstate Commerce Act in favor of shippers. No written waiver of the statute was involved. This Court held, in effect, that Congress having created a new cause of action in favor of shippers and having in the same statute provided a time limit for the filing of actions thereon, the cause of action, no suit having been brought, was destroyed by the lapse of the time specified in the enabling statute, and that the various state statutes of limitation were not applicable.

This Honorable Court thus applied to the peculiar facts in the Phillips case the generally recognized principle of law that when a statute creates a legal liability, with a right to suit for its enforcement, provided such suit be brought within a designated period, the time within which the suit must be brought operates as a limitation of the liability itself, and not of the remedy alone.

All of the other cases cited and relied upon by petitioner are similar cases, involving causes of action created by a statute. None of them rests in simple contract or involves an agreement waiving the statute of limitations applicable to such type of action.

There is no provision in the Interstate Commerce Act, as amended A. D. 1920, which creates any cause of action in favor of a carrier as against a shipper for its freight

charges, for the simple reason that Congress well knew that such cause of action already existed at common law. In fact, when the Interstate Commerce Act was adopted no period of limitation was specified for the bringing of actions by carriers for the recovery of their charges. Section 16(3)(a), applicable to the present case, was not a part of the original Interstate Commerce Act, was not in existence when the Phillips case was decided, and was not added to the Interstate Commerce Act until the adoption of the Transportation Act of 1920 (U. S. Code Ann., Title 49, Sec. 16, Par. 3, Note).

That an action upon a written bill of lading for freight charges is one upon contract, and not one created by statute, has been determined by this Court and the Circuit Courts of Appeal.

Louisville & Nashville R. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59.
New York Central R. R. Co. v. *Mutual Orange Distributors*, 251 Fed. 230.
Atchison, Topeka & Santa Fe Ry. Co. v. *Hunt Bros. Fruit Co.*, 34 Fed. (2d) 582.

It was for such very cogent reasons without doubt that the District Court in *Pennsylvania R. R. Co.* v. *Susquehanna Collieries*, 23 Fed. (2d) 499, and the Supreme Court of California in this case did not apply the particular rule enunciated by this Honorable Court in the Phillips case but applied the generally recognized rule that ordinarily statutes of limitations may be waived.

Petitioner finally argues that this waiver of the limitation provision in the Interstate Commerce Act *of itself* constituted a discrimination in violation of the Interstate Commerce Act. Petitioner in its answer did not plead, nor did it prove at the trial, any discrimination or preference, or any misuse or abuse of such agreements by this carrier or any carrier.

The preferences defined as unjust discriminations and prohibited by the Interstate Commerce Act are the charging, demanding, collecting or receiving by any carrier *from any person* of a greater or less compensation for any service rendered in the transportation of passengers or property than the carrier charges, demands, collects or receives *from any other person* for a like contemporaneous service (U. S. Code Anno., Title 49, Sec. 2 and Sec. 6 Par. 7). The pleading and proofs here show that Respondent charged Petitioner for the services rendered it, the exact charge specified in its published tariffs and charged to every other shipper. Respondent, The Railroad Company, seeks but to enforce this provision of the Act by collecting its lawfully prescribed freight charges. Petitioner, who claims to abhor discrimination, seems determined to violate this provision of the Act and to profit by the unjust discrimination which will inevitably result, if it is permitted to ship its goods in interstate commerce without payment of the lawfully prescribed tariff rates for such service.

The pleading and proofs in this record do not indicate that any preference whatsoever was sought or given on part of Respondent. Petitioner had requested additional time within which to determine whether to pay the claim without suit or to attempt a defense. Its voluntary waiver of the so styled period of limitations constituted no preference and relieved it from no liability. It was entirely in aid of the collection of the prescribed freight charges by the Respondent-Carrier.

But even if preference could be said to have resulted from extending time for filing action for a period of two months, such preference would not invalidate the waiver. Preferences other than those specifically forbidden by Section 2 and Section 6, Par. 7, of the Interstate Commerce Act are permitted by the Act unless they are undue or unreasonable (U. S. Code Anno., Title 49, Sec. 3, Par. 1). It is elementary that the Interstate Commerce Act does not de-

nounce every preference, but only such as are undue or unreasonable. The right to accept a waiver agreement is quite similar to the right to require prepayment of freight from one shipper and to extend credit in like case to another, which was held (*Gamble-Robinson Commission Co.* v. *Chicago & N. W. Ry. Co.*, 168 F. 161) to be proper and not to subject the second shipper to undue or unreasonable prejudice or disadvantage under section 3 of the Interstate Commerce Act.

The pleadings and proofs in this action do not disclose that any preference whatever was either granted or sought to be granted to the Petitioner by the Respondent Railroad Company.

Petitioner, being in fact both shipper and consignee, and owner, requested the Interstate carrier to withhold action under the statute until, in the seeming doubtful circumstances, it might investigate and determine whether the carrier's claim should be paid without suit or a defense based on payment supposedly previously made should be interposed.

Petitioner's voluntary tender and waiver of its contractual right of limitation of action when accepted by the Carrier-Respondent was at most but the surrender for value received of a benefit lodged by the statute in the Shipper-Petitioner. It did not, and should not be held to constitute a surrender on part of the Carrier-Respondent of any of its rights to recover its freights and so result in discriminations between shippers which it is and was the purpose of the Interstate Commerce Act to prevent.

Shipper-Petitioner's own and voluntary waiver of some benefit uniquely conferred upon it should not and as we respectfully contend could not rightfully operate as a surrender or negation of an obligatory duty on part of the Carrier-Respondent.

Insofar as the Carrier was concerned, the surrender tendered by shipper was solely in the interest of uniformity.

Petitioner's tender and waiver even if and when accepted constituted no true preference in its own favor and did not relieve, as it quite plainly was not intended to relieve, the Respondent-Carrier from any obligation or duty with respect to the collection of its published tariff charges.

The course pursued in the progress of the controversy through the courts of California was entirely equitable and the results achieved as demonstrated by the opinions and judgments of the Courts of California (R. 171-179 and 196-204) are not only equitable but also formally legal and correct.

As said by Marks J., Associate Justice, District Court of Appeals, California, Fourth Appellate District (R. 171 at p. 177):

> "A study of the act leaves the conclusion that it lacks appropriate language to create in the common carrier a right of action to collect its transportation charges, where no part of them has been paid, separate and distinct from its common law right to bring such an action. Of course, such right of action is recognized, but hardly created, and [fol. 267] recovery is limited to the rates established by the Interstate Commerce Commission.
>
> "The conclusion follows that in a case such as we have here where no part of the transportation charges had been paid and the carrier brings its action to recover all of those charges based on rates established by the Interstate Commerce Commission, the cause of action is one in contract given by the common law to the carrier long before any Interstate Commerce Act was adopted and is not a right of action created by that act. Therefore the limitation in that act does not destroy the right of action by reason of lapse of time, but is merely a limitation on the remedy which may be waived by the shipper.
>
> "There is nothing in any of the cases cited to us that in any manner conflicts with this conclusion. With one exception all of those cases were either by the carrier to recover the difference between the rate paid by the shipper and the higher rate fixed by the commission or by the shipper to recover the difference between the rate paid by the shipper and the lower rate fixed by the

commission. There was no such right of action known to the common law. The cause of action was created by statute."

* * * * *

"If the purpose of the Interstate Commerce Act is to prohibit unjust discrimination by the carrier and to protect the shipper, then certainly the judgment in this case should be affirmed. To do otherwise would be to permit a carrier to give preference to a large shipper by the very procedure here followed. It would not only open the gate but would signpost the way to discriminations and preferences." (R. 179)

* * * * *

"If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of the carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference. Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8, Interstate Commerce Act, 49 U. S. C. A.) An example is Gamble-Robinson Commission Co. v. Chicago, N. W. Ry. Co., 168 F. 161, where an action was brought by a shipper who had not received the same credit terms accorded other shippers. The court said in that case that the Commerce Act left the carrier free to exercise all the rights and privileges under the common law insofar as they were not rendered unlawful by the act; that the act did not make all preferences or advantages unlawful, and that there was nothing unreasonable in requiring prepayment of freight in the case of one shipper and in extending credit to another. If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he should not be heard to contend that injury to him has resulted because he is compelled

to discharge his liability to pay lawful freight charges —a liability which was created when the shipments were delivered [fol. 311] and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.

"It is founded on a sound public policy. But that policy should not permit the favored shipper to urge discrimination against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge." (R. 203)

* * * * *

"However, as we have noted, a contract to preserve the carrier's right and duty to collect lawful freight charges as against the running of the statute of limitations, when reasonably exercised, serves to prevent rather than create discrimination among shippers, and in our opinion, should not be deemed violative of the language or purpose of the Interstate Commerce Act." (R. 204)

Nor was the delay in instituting this suit, somewhat less than two months after the expiration of the statutory period in reliance upon the waiver agreement, subject to criticism from the standpoint of preference, any more than would be delay in instituting a similar suit, in the hope of effecting voluntary payment until just before the expiration of such period in the hope that by such delay payment of the charges would be secured by amicable means. The Supreme Court of California dealt with the contention of preference (this phase of the situation) in the following language (R. 203, 204):

"If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of th carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference.

> Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8. Interstate Commerce Act, 49 U. S. C. A.) * * * If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he should not be heard to contend that injury to him has resulted because he is compelled to discharge his liability to pay lawful freight charges—a liability which was created when the shipments were delivered (fol. 311) and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.
>
> "It is founded on a sound public policy. But that policy should not permit the favored shipper to urge discrimination against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge."

In the absence of any evidence to establish discrimination or preference, the courts of California have found as a fact that none exists herein. The public interest was served by the decision of the California Supreme Court requiring Petitioner to pay the uniform published tariff rate for the services it had received. There is no question of public interest or of importance presented to this Court for consideration.

Petitioner's statement that to permit such waivers when the carrier is but enforcing the provisions and certain purposes of the Interstate Commerce Act, will result in some radical type of discrimination against shippers in the future, is wholly without merit. If in the future any carrier should grant an undue or unreasonable preference through some waiver of the period of limitations, its conduct would be subject to the control of the Interstate Commerce Commission and the courts. The dire consequences anticipated by Petitioner could only result in the event that

both the Commission and the courts failed to perform their plain duty.

It is submitted that an analysis of the Petition will disclose no true basis for the granting of *certiorari* herein.

It is respectfully submitted the Petition should be denied.

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